

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF WASHINGTON  
3 AT TACOMA

4 WENDEL WAYNE JOHNSON,

5 Petitioner,

6 v.

7 MAGGIE MILLER-STOUT,

8 Respondent.

CASE NO. C11-5822BHS

ORDER ADOPTING REPORT  
AND RECOMMENDATION AND  
DISMISSING PETITION

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10 This matter comes before the Court on the Report and Recommendations (“R&R”)  
11 (Dkt. 30) issued by United States Magistrate Judge J. Richard Creatura on the petition for  
12 writ of habeas corpus brought under 28 U.S.C. § 2254 by Petitioner Wendel Wayne  
13 Johnson (“Johnson”). Having considered the R&R, Johnson’s objections, and the entire  
14 record, the Court adopts the R&R and dismisses the petition for the reasons stated herein.

15 **I. FACTUAL AND PROCEDURAL HISTORY**

16 The Court will rely on the factual summary of the Washington Court of Appeals  
17 found in the R&R. Dkt. 24 at 2 (quoting Dkt. 22, Exh. 5). This factual summary is  
18 accorded a presumption of correctness under 28 U.S.C. § 2254(e)(1). *See Moses v.*  
19 *Payne*, 555 F.3d 742, 746 n.1 (9th Cir. 2009). The Court will also rely on the procedural  
20 summary found in the R&R as neither party objects to the magistrate judge’s recitation of  
21 such history. Dkt. 24 at 2-5.  
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1 On October 5, 2011, Johnson filed his petition for writ of habeas corpus under 28  
2 U.S.C. § 2254 in this Court. Dkt. 6. On March 16, 2012, the magistrate judge issued an  
3 R&R recommending that Johnson's petition be dismissed. Dkt. 24. On March 26, 2012,  
4 Johnson filed objections to the R&R. Dkt. 25.

## 5 II. DISCUSSION

### 6 A. Standard

7 A habeas corpus petition shall not be granted with respect to any claim adjudicated  
8 on the merits in the state courts unless the adjudication either (1) resulted in a decision  
9 that was contrary to, or involved an unreasonable application of, clearly established  
10 federal law, as determined by the Supreme Court; or (2) resulted in a decision that was  
11 based on an unreasonable determination of the facts in light of the evidence presented to  
12 the state courts. 28 U.S.C. §2254(d). Under the "contrary to" clause, a federal habeas  
13 court may grant the writ if the state court arrives at a conclusion opposite to that reached  
14 by the Supreme Court on a question of law or if the state court decides a case differently  
15 than the Supreme Court has on a set of materially indistinguishable facts. *Williams v.*  
16 *Taylor*, 529 U.S. 362, 412-413 (2000). Under the "unreasonable application" clause, a  
17 federal habeas court may grant the writ if the state court identifies the correct governing  
18 legal principle from this Court's decisions but unreasonably applies that principle to the  
19 facts of the prisoner's case. *Id.*

20 A determination of a factual issue by a state court shall be presumed correct, and  
21 the applicant has the burden of rebutting the presumption of correctness by clear and  
22 convincing evidence. 28 U.S.C. §2254(e)(1). Further, if the factual basis for the claims

1 in a habeas petition has not been adequately developed in state court, an evidentiary  
2 hearing may not be held unless the claim (1) relies on a new rule of constitutional law,  
3 made retroactive to cases on collateral review by the Supreme Court that was previously  
4 unavailable, or a factual predicate that could not have been previously discovered through  
5 the exercise of due diligence; and (2) the facts underlying the claim would be sufficient to  
6 establish by clear and convincing evidence that but for constitutional error, no reasonable  
7 fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C.  
8 §2254(e)(2).

9 **B. Johnson's Objections**

10 Johnson's objections to the R&R are essentially a restatement of the claims made  
11 in his petition. He does not point out specific errors assigned to the R&R, rather, Johnson  
12 reargues the issues decided by the magistrate judge. Regardless, the Court concludes  
13 that, even considering Johnson's objections, the magistrate judge did not err in  
14 recommending that the petition be dismissed.

15 **1. Ineffective Assistance of Counsel**

16 Johnson has failed to show that the magistrate judge erred in concluding that the  
17 decision of the Washington Supreme Court Commissioner on his claim for ineffective  
18 assistance of counsel was the result of an unreasonable application of federal law or was  
19 based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). In  
20 reviewing his personal restraint petition, the Washington Supreme Court Commissioner  
21 concluded that Johnson's claim for ineffective assistance of counsel failed under the two-  
22 part standard for evaluating such claims. Dkt. 22, Exh. 13. First, Johnson was required

1 to show that his counsel's representation was so deficient that it "fell below an objective  
2 standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 686. Second,  
3 Johnson had to show that the deficient representation prejudiced the defense so "as to  
4 deprive the defendant of a fair trial, a trial whose result is unreasonable." *Id.* As the  
5 magistrate judge points out in the R&R, the Washington Court of Appeals rejected  
6 Johnson's claim in reviewing his PRP, stating:

7           Mr. Johnson first contends that trial counsel was ineffective in not  
8 investigating medical evidence and in not procuring a defense medical  
9 expert to counter the State medical expert's testimony. But counsel had  
10 legitimate tactical and strategic basis for not conducting a more aggressive  
11 investigation of medical issues and for not retaining an expert. The  
12 complaining witness testified that the vaginal and oral rapes occurred a  
13 decade earlier, when she was about seven years old. The State's expert  
14 testified that there was scarring on the complaining witness's hymen  
15 consistent with prepubescent penetration. On cross-examination, defense  
16 counsel competently had the expert concede alternative theories to explain  
17 the scarring, such as more recent juvenile sexual activity. Mr. Johnson can  
18 only speculate that further examination of the complaining witness's  
19 medical records would have had any advantageous probative value, and had  
20 counsel been able to procure an expert willing to testify on Mr. Johnson's  
21 behalf, that expert would have been subject to an aggressive cross-  
22 examination. Thus, defense counsel had a tenable reason to focus on cross-  
examination of the State's expert. *See In re Pers. Restraint of Davis*, 152  
Wn. 2d 647, 709, 101 P.3d 1 (2004) (petitioner must establish counsel's  
lack of legitimate strategic or tactical reasons for litigation conduct). And  
even if counsel was defective in this regard, Mr. Johnson demonstrates no  
reasonable probability that, but for that alleged deficiency, the jury would  
have acquitted him. *Davis*, 152 Wn. 2d at 673 (petitioner claiming  
ineffective assistance must establish both deficient performance and  
prejudice).

Dkt. 22, Exh. 13 at 1-2.

The Court concludes that Johnson has failed to show that the Washington Supreme  
Court Commissioner, or the Magistrate Judge, erred in concluding that his ineffective

1 assistance of counsel claim is without merit. Johnson failed to show that his counsel's  
2 choice not to conduct a more aggressive investigation of the medical evidence and/or not  
3 to retain a defense medical expert fell below an objective standard of reasonableness, or  
4 even if it did, that there was a reasonable probability that the result of the trial would have  
5 been different.

## 6       **2. Prosecutorial Misconduct**

7       Johnson has failed to show that the magistrate judge erred in finding that the  
8 decision of the Washington Supreme Court Commissioner on his claim for prosecutorial  
9 misconduct was the result of an unreasonable application of federal law or was based on  
10 an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

11       The question for the Court to consider in analyzing whether prosecutorial  
12 misconduct warrants habeas relief is whether the misconduct denied the defendant a fair  
13 trial in that the comments “so infected the trial with unfairness as to make the resultant  
14 conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181  
15 (1986)(internal quotation marks omitted). Prosecutorial “remarks must be examined  
16 within the context of the trial to determine whether the prosecutor's behavior amounted to  
17 prejudicial error. In other words, the Court must consider the probable effect the  
18 prosecutor's response would have on the jury's ability to judge the evidence fairly.”  
19 *United States v. Young*, 470 U.S. 1, 11-12 (1985).

20       The Washington Supreme Court Commissioner stated:

21               Mr. Johnson further claims the prosecutor committed misconduct in  
22 closing argument by explicitly referring to the manner of the alleged rapes  
and by claiming that a defense witness had lied. Mr. Johnson argues that

1 these remarks conveyed the prosecutor's personal opinion as to his guilt  
2 and the veracity of witnesses. To the contrary, the prosecutor's statements  
3 regarding oral and vaginal rape were based on evidence adduced at trial.  
4 And the prosecutor did not act improperly in highlighting facts that the jury  
5 may consider in assessing the credibility of witnesses. *See State v. Warren*,  
6 165 Wn.2d 17, 30, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007  
7 (2009) (prosecutor had wide latitude to argue reasonable inferences from  
8 evidence.

9 Dkt. 22, Exh. 13 at 2-3.

10 The Court concludes that Johnson has failed to show that the magistrate judge  
11 erred in concluding that the Supreme Court Commissioner's finding that no prosecutorial  
12 conduct occurred is contrary to established Supreme Court law, nor is it an unreasonable  
13 application of that law considering the facts and evidence in the record. Johnson fails to  
14 show that the prosecutor acted improperly in arguing the evidence and reasonable  
15 inferences in his closing arguments.

### 16 **C. Certificate of Appealability**

17 Under 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b), a  
18 petitioner may not appeal the final order in a habeas corpus proceeding in which the  
19 detention complained of arises out of a state court proceeding or in a proceeding under 28  
20 U.S.C. § 2255 unless the district court or the Ninth Circuit issues a certificate of  
21 appealability identifying the particular issues that may be pursued on appeal. *United*  
22 *States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

To obtain a certificate of appealability, a petitioner must make a substantial  
showing of the denial of a constitutional right. A petitioner must also demonstrate that  
reasonable jurists could debate whether, or agree that, the petition should have been

1 resolved in a different manner or that the issues presented were adequate to deserve  
2 encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

3 Here, the Court concludes that Johnson has failed to make a substantial showing of  
4 the denial of a constitutional right. In addition, he has failed to show that reasonable  
5 jurists could agree that his petition should have been resolved in a different manner.  
6 Accordingly, the Court concludes that Johnson is not entitled to a certificate of  
7 appealability.

#### 8 IV. ORDER

9 Therefore, it is hereby **ORDERED** as follows:

- 10 (1) The R&R (Dkt. 24) is **ADOPTED**;  
11 (2) Johnson's petition (Dkt. 6) is **DISMISSED**; and  
12 (3) Johnson is not entitled to a certificate of appealability.

13 Dated this 16th day of March, 2012.

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BENJAMIN H. SETTLE  
United States District Judge